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# RISK AND ANXIETY—DEFINING DAMAGE IN THE TORT OF NEGLIGENCE

*Rothwell v. Chemical & Insulating Co. Ltd. & Anor.*[1]

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## I. INTRODUCTION

The proposition that damage is the gist of negligence is so well-established that it is almost axiomatic, but the question of what constitutes damage has always given rise to difficulty. Where injury to the person is concerned, physical damage certainly qualifies, and this extends (albeit in restricted circumstances) to medically recognised psychiatric harm. But even physical damage is irrecoverable if it is insignificant or *de minimis*,[2] and other forms of personal harm—such as unhappiness, distress or anxiety about the risk of suffering injury—have never been regarded as sufficient to amount to damage for the purposes of the tort.

That having been said, the courts in recent years have shown signs of adopting a broader-brush approach to damage, particularly in terms of its interplay with the rules on causation. In the arena of medical negligence, the House of Lords in *Chester v. Afshar*[3] blurred the lines between causation and damage when awarding damages to a claimant who had not been given the opportunity to choose when and where to undergo treatment.[4] And in *Gregg v. Scott*,[5] despite a finding in favour of the defendant in an action based on loss of a chance, their Lordships indicated that

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1 [2007] UKHL 39, [2007] 3 W.L.R. 876 [*Rothwell*]. The court comprised Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Mance.

2 See, *e.g.*, *Cartledge v. E. Jopling & Sons Ltd*. [1963] A.C. 758 (H.L.).

3 [2004] UKHL 41, [2005] 1 A.C. 134 [*Chester*].

4 In *Chester*, the defendant doctor advised the claimant to undergo spinal surgery, which carried a small risk that the claimant would suffer paralysis—a risk of which the defendant failed to inform her. The surgery was carried out competently, but the risk eventuated and the claimant was paralysed. Even though the claimant could not show that she would have refused the surgery had she been informed of the risk, the House of Lords nevertheless held by a majority of 3:2 that the defendant was liable for depriving the claimant of the right to make an informed choice about whether, when and from whom she wished to receive treatment. For analysis of the decision, see, *e.g.*, Lara Khoury, "*Chester v. Afshar*: Stepping Further Away from Causation?" [2005] Sing. J.L.S. 246.

5 [2005] UKHL 2, [2005] 2 W.L.R. 268 [*Gregg*]. *Gregg* involved a medical misdiagnosis which resulted in a patient's chances of recovering from non-Hodgkin's lymphoma being reduced from 42% to 25%.

they might, in very limited circumstances, be willing to take a slightly more liberal approach to what constitutes recoverable damage.[6]

Similarly, significant developments have taken place in the realm of industrial injury. In *Fairchild v. Glenhaven Funeral Services Ltd.*,[7] the House of Lords effectively abandoned the rules on causation in holding that consecutive employers had each materially contributed to the fatal condition of mesothelioma from which their former employees suffered, even though the condition had been triggered at a single, unascertainable moment.[8] And in *Barker v. Corus U.K. Ltd.*[9] the House of Lords re-interpreted *Fairchild* on almost identical facts and awarded damages based on the risk of contracting mesothelioma to which consecutive employers had exposed their former employees.[10] Moreover, following a number of High Court decisions in the 1980s,[11] employees who had been exposed to asbestos through the negligence of their employers successfully claimed damages in actions for anxiety associated with the risk that they might contract mesothelioma or other serious asbestos-related illnesses following their diagnosis with a condition known as pleural plaques.

Recently, however, the House of Lords in *Rothwell* (and three other appeals which were heard with it)[12] affirmed a finding by the Court of Appeal that the definition of damage under which claims for risk and anxiety had been allowed in pleural plaque cases was wrong, with the result that such claimants are no longer entitled to compensation, nor are they able to claim for free-standing psychiatric harm caused through fear of developing a life-threatening disease. In reaching this decision, their Lordships favoured a narrow and traditional interpretation of damage, and one which reasserts the need for a claimant to establish recoverable physical harm before seeking compensation for more nebulous complaints such as

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6 See, *e.g.*, the dictum of Lord Phillips of Worth Matravers M.R., one of the majority judges in *Gregg*, who suggested that:

> Where medical treatment has resulted in an adverse outcome and negligence has increased the chance of that outcome, there may be a case for permitting a recovery of damages that is proportionate to the increase in the chance of the adverse outcome.

(*Ibid.* at para. 190).

7 [2003] 1 A.C. 32 [*Fairchild*].

8 Although it was impossible to determine when each employee had contracted the disease, and consequently for which employer he had been working at the relevant time, the House of Lords held in *Fairchild* that all the employers were jointly and severally liable. Their decision—which involved a rehabilitation of the decision in *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 [*McGhee*]—was based on treating exposure to the risk of harm as the equivalent of having materially contributed to the harm.

9 [2006] UKHL 20, [2006] 2 A.C. 572 [*Barker*].

10 In *Barker*, the House of Lords, through the leading judgment of Lord Hoffmann, rejected the accepted understanding of *Fairchild* under which the employers were treated as having materially contributed to the employees' injuries. Instead, their Lordships (Lord Rodger dissenting) interpreted the decision in *Fairchild* as having been based on the increased risk of contracting mesothelioma which each employer had created. This led their Lordships to hold in favour of proportionate, rather than joint and several, liability. (Baroness Hale agreed with Lord Rodger in so far as the interpretation of *Fairchild* was concerned, but found with the majority on proportionate liability). Significantly, the proportionate liability aspect of the decision was subsequently reversed by section 3 of the U.K. *Compensation Act 2006*, which restored *in solidum* liability in mesothelioma cases. For further discussion of the "increased risk" aspect of *Barker*, see *infra*, text accompanying note 36 *et seq*.

11 See *infra* notes 16, 17 and 18.

12 *Topping v. Benchtown Ltd. (formerly Jones Bros. Preston Ltd.)*; *Johnston v. NEI International Combustion Ltd.* and *Grieves v. F.T. Everard & Sons Ltd. and Anor*.

risk and anxiety. The decision is significant not only in terms of the specific limits which it places on claims for asbestos-related industrial injuries and psychiatric harm, but also in its wider implications for a restrictive across-the-board approach to damage.

## II. Background

Pleural plaques are localised areas of thickening (or scarring) of the pleura, the slippery membrane covering the lungs. They are generally regarded as the least serious consequence of the inhalation of asbestos dust, since they do not normally cause any symptoms, nor do they constitute a necessary pre-condition to other asbestos-related illnesses. However, the development of pleural plaques does indicate that the claimant has been exposed to heavy levels of asbestos, and that he is therefore at higher risk[13] of developing serious diseases such as mesothelioma, asbestosis and lung cancer—all of which are usually (and in the case of mesothelioma, invariably) fatal.[14] For this reason, persons diagnosed with pleural plaques not uncommonly suffer anxiety that they might develop one of these life-threatening diseases.[15]

In three first instance decisions during the 1980s—*Church v. Ministry of Defence*,[16] *Sykes v. Ministry of Defence*[17] and *Patterson v. Ministry of Defence*[18]—damages were awarded for pleural plaques sustained through negligent exposure to asbestos dust. Based on these decisions, claims during the next two decades were settled on the assumption that pleural plaques (certainly when combined with the risk of, and attendant anxiety about, contracting more serious conditions) amounted to actionable injury. However, in 2005 a group of employers' insurers decided to challenge the accepted position, and the issue was thus litigated in *Rothwell* and nine other test cases involving claimants who had developed pleural plaques through negligent exposure to asbestos dust in the workplace.

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[13] See the judgment of Lord Scott in *Rothwell*, *supra* note 1, who at para. 62 referred to statistics which established that the claimants and others suffering from a similar level of exposure to asbestos had a 5% chance of contracting one of the life-threatening asbestos-related diseases.

[14] For a full discussion of the nature and effects of mesothelioma, see the decision of the House of Lords in *Fairchild*, *supra* note 7.

[15] A common feature of asbestos-related conditions is the long period between exposure to asbestos and the onset of the relevant condition. Lung cancer normally develops years after initial exposure to the relevant carcinogen. Pleural plaques are rarely detected during the first twenty years after exposure to asbestos, and there is a similar lapse of time following exposure before asbestosis develops. With mesothelioma, the average period between initial exposure and the onset of symptoms (followed within eighteen months by death) is even longer, at about forty years.

[16] (1984) 134 N.L.J. 623 [*Church*]. In *Church*, Peter Pain J., while taking the view that it would be an error to treat pleural plaques as damage in their own right, found that damage had been caused by asbestos passing through the lungs and causing the plaques to form. He held that the combination of these two things was not so minor that the law should disregard it.

[17] *The Times*, 23 March 1984 [*Sykes*]. In *Sykes*, Otton J. considered that compensable damage could be established based simply on a change in the structure of the pleura, and that in awarding damages the court could take account of the risk of other diseases and the plaintiff's anxiety.

[18] [1987] C.L.Y. 1194 [*Patterson*]. In *Patterson*, Simon Brown J. did not consider that a physiological change free of symptoms constituted actionable injury, but he held that pleural plaques together with the risk of future disease and anxiety were sufficient to give rise to an action.

In the High Court[19] Holland J., while not accepting the proposition that pleural plaques were themselves sufficient to create a cause of action, took the view that they were pointers to permanent injury in the form of penetration of the chest by asbestos fibres, and that the risk of contracting a more serious condition, coupled with the resulting anxiety, completed the basis for the action.[20] He therefore allowed the claims, and also awarded damages for psychiatric harm to one of the claimants (Mr. Grieves), who, on discovering that he had pleural plaques, had become clinically depressed about the prospect that he might contract a fatal asbestos-related disease. However, on appeal to the Court of Appeal[21] by seven of the insurers, the two majority judges (Lord Phillips and Longmore L.J.) rejected the 'aggregation' theory, and held that the development of pleural plaques did not constitute recoverable damage. They also held that no duty of care was owed to Mr. Grieves with respect to his clinical depression.

Four of the claimants then appealed to the House of Lords—three on the issue of whether pleural plaques and/or the risk of future harm and anxiety constituted recoverable damage, and the fourth, Mr. Grieves, on both that issue and the psychiatric harm point.

## III. The Decision of the House of Lords

### A. *Pleural Plaques, Risk and Anxiety*

Their Lordships unanimously agreed that pleural plaques could not in themselves give rise to a cause of action—either because as mere scars on the lungs they were not a form of injury at all,[22] or because even if they *could* be seen as a type of injury, they did not cause any material damage and were thus to be regarded as *de minimis*.[23] While some of their Lordships sympathised with the view taken by Smith L.J., who as the minority judge in the Court of Appeal had considered that pleural plaques should be treated as compensable injuries,[24] none considered these reasons sufficient to treat as recoverable damage an internal, invisible and generally asymptomatic condition. In this respect, the decision is uncontroversial—particularly given that even Smith L.J. ultimately considered the action to be based not merely on the tissue change to the lungs, but also on the risk of more serious diseases.[25]

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[19] Decided *sub nom Grieves & Ors. v. FT Everard & Sons & British Uralite Plc & Ors.* [2005] EWHC 88 (Q.B.).

[20] Of relevance in this respect is the fact that under ss. 11, 12 and 14 of the *U.K. Limitation Act 1980* (and indeed under Singapore's *Limitation Act* (Cap. 163, 1996 Rev. Ed. Sing.), s. 24(A)), the three year limitation period which applies in cases of personal injury does not start to run until the claimant becomes aware that he has sustained a significant injury.

[21] *Rothwell v. Chemical & Insulating Co. Ltd. & Anor.* [2006] EWCA Civ. 27, [2006] I.C.R. 1458, [2006] 4 All E.R. 1161 [*Rothwell* (C.A.)]. The court comprised Lord Phillips of Worth Matravers, C.J., Longmore and Smith L.JJ.

[22] See, *e.g.*, Lord Hoffmann at para. 2 and Lord Mance at para. 103 in *Rothwell*, *supra* note 1.

[23] See, *e.g.*, Lord Hope at para. 39 and Lord Rodger at para. 88 in *Rothwell*, *ibid*.

[24] *Supra* note 21 at paras. 112–133. In *Rothwell* (C.A.), Smith L.J. gave two reasons for this view: that in rare cases pleural plaques *could* give rise to symptoms, and that as lesions they would amount to compensable damage if sustained in other parts of the body.

[25] *Ibid*. at para. 134.

More significantly, their Lordships also rejected the aggregation theory. Lord Hoffmann, citing *Gregg*,[26] noted that "[i]n principle, neither the risk of future injury nor anxiety at the prospect of future injury is actionable," unless it can be attached to already actionable damage.[27] Lord Scott dismissed the theory even more bluntly, with the simple conclusion that "[n]ought plus nought plus nought equals nought,"[28] and Lord Roger saw the plaques as "nothing more than a 'hook' on which to hang a claim for independently irrecoverable damages which they did not cause."[29]

While the reasons for treating trivial or negligible injury as *de minimis* are self-evident, it is not at first blush quite so obvious why several independently irrecoverable forms of harm should not in combination amount to a recoverable whole. Lord Scott's conclusion that "nought plus nought plus nought equals nought" was premised on the assumption that since none of the three sources of harm was independently actionable—the plaques because they were *de minimis* and the risk and anxiety because they were not able to give rise to claims in their own right—none of them counted for anything. One could take the view that this in a sense pre-judged the issue, which was whether small or independently irrecoverable forms of damage *must* be looked at individually, and thus treated as if they were nothing, or whether they could be aggregated to amount to something recoverable. On the other hand, even the judges who took a less obviously mathematical approach found no way to overcome the absence of a recoverable 'hook' on which to hang the independently irrecoverable—and indeed causally distinct—risk and anxiety.

It can of course be argued that, just as it is potentially unfair to require damage to be more probable than not to occur in a claim based on loss of chance,[30] so it is potentially unjust to require a hook of independently recoverable damage in claims for risk and anxiety. But the law has to maintain clear boundaries, both to discourage frivolous actions and to prevent claims where the putative damage cannot properly be calculated. Thus the rule that the risk of a life-threatening disease cannot in itself give rise to a cause of action[31] is founded primarily on the fact that risk of damage is, by definition, not the same thing as damage itself, and that any claim based on risk is therefore intrinsically speculative, since the claimant will either be over-compensated if the risk does not eventuate or under-compensated if it does.[32] And the rule which

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[26] *Supra* note 5.

[27] *Rothwell*, *supra* note 1 at para. 12.

[28] *Ibid*. at para. 73.

[29] *Ibid*. at para. 91. Of the two remaining judges, Lord Hope, observing that the court was overturning established law, took a more measured approach, and acknowledged (*ibid*. at para. 42) that the facts gave rise to "a genuine problem of legal analysis," but he too ultimately concluded (*ibid*. at para. 49) that, since the plaques themselves were merely indicators of exposure to unconnected risks of contracting serious asbestos-related diseases, it was not legally possible to link them with those risks and the attendant anxiety. Lord Mance (*ibid*. at para. 103) was similarly unpersuaded by the aggregation theory.

[30] See, *e.g.*, the judgment of Lord Nicholls in *Gregg*, *supra* note 5 at para. 3: "The loss of a 45% prospect of recovery is just as much a real loss … as the loss of a 55% prospect of recovery."

[31] See the decision in *Gregg*, *ibid*.

[32] This is a powerful point, and one which sways most judges—though not all. For example, when dealing with the issue of loss of chance in his minority judgment in *Gregg*, *ibid*., Lord Nicholls argued (at para. 46) that the boundaries between actual damage and a decreased chance of avoiding damage were "crude to an extent bordering on arbitrariness." Since the damage at the heart of the claim in *Gregg* had not yet occurred, Lord Nicholls' judgment implies that in appropriate situations the fact that damage has not yet eventuated, while relevant in assessing damages, will not necessarily preclude a determination that there

prevents mere anxiety—even anxiety about one's premature death[33]—from being recoverable is based on the fact that fear, worry and concern are very hard concepts to pin down, with many incrementally indistinguishable gradations dividing vague and occasional apprehension from serious anxiety. While the law accepts that anxiety which has reached the level of a clinically diagnosed psychiatric illness *does* amount to real and recoverable harm, it is extremely difficult to imagine how the courts could determine at what stage any condition short of this might cross the line and become compensable.[34]

What, then, of the argument that although risk and anxiety may be independently irrecoverable, they should in pleural plaque cases be aggregated with the plaques to form recoverable harm? On this point, it is hard to argue with the two principal objections identified by their Lordships. First, there is no justification for an asymptomatic condition giving rise to an independent claim for damages, or for it offering a hook on which to hang other claims. Second, even if one *were* to accept that such a condition could be treated as a hook, the risk and anxiety for which recovery is sought in pleural plaque cases relate not to the plaques themselves, but rather to the claimant's fear that he might be at risk of contracting a different, more serious, asbestos-related disease. This poses a fundamental obstacle to establishing a causal link—however hair-splitting that obstacle might seem to the claimant for whom diagnosis with pleural plaques is the reason for fearing the more serious disease.[35]

Their Lordships' conclusion in *Rothwell* that risk and anxiety could not give rise to a claim either alone or in aggregation with an asymptomatic condition is logical and consistent with both principle and practice. The only possibly surprising omission is the absence of any reference in the decision to *Barker*,[36] where the House of Lords (in re-interpreting its earlier decision in *Fairchild*[37]) held a number of employers liable

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is recoverable damage. Moreover, in a sense *all* personal injury actions—even those involving damage which has already occurred and is apparently clearly definable—result in under- or over-compensation, since no court can anticipate what the future holds for a given claimant or determine the precise level of pain, suffering and loss to which any claimant will be subjected.

[33] See *Hicks v. Chief Constable of South Yorkshire* [1992] 2 All E.R. 65.

[34] See Sarah Green, "Risk, Exposure and Negligence" (2006) 122 L.Q.R. 386. In her article on the decision in *Rothwell* (C.A.) (which was referred to by Lord Hope in the House of Lords, *supra* note 1 at para. 55), Green observes at 388:

> In ideological terms, any concession that anxiety can have tortious consequences of its own would be incredibly difficult to reconcile with the negligence rules on remoteness of damage. It is … not easy to see how a defendant can be expected reasonably to foresee that damage of the 'anxiety type' might occur if it is not even clear where that type of damage begins and ends.

[35] For further discussion of this point, see Green, *ibid* at 387. Green argues that to award damages to claimants who have developed pleural plaques would arbitrarily place them in a better position than other employees who have also been exposed to asbestos during their working lives, but who have not developed plaques. While this is an excellent point, it may perhaps understate the significance of medical diagnosis on awareness of risk and creation of anxiety. A person informed by a doctor that he has developed pleural plaques will also be informed (or reminded) of the risks of asbestosis and mesothelioma associated with the levels of asbestos to which he has been exposed, whereas a person who has not been diagnosed may still either be largely unaware of the risks associated with exposure to asbestos, or more realistically—particularly if he has undergone tests for plaques with negative results—he may still hope that he has avoided exposure in sufficient quantities to place him at risk.

[36] *Supra* note 9.

[37] *Supra* note 7.

for the extent to which each of them had created—or increased—the risk that their employees would contract mesothelioma. Of course, in *Barker* all of the employees had already died of the disease, and Lord Hoffmann stated unequivocally in that case that "[a]though the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has actually been contracted."[38] On this basis alone, therefore, *Barker* and *Rothwell* were factually distinguishable. Moreover, *Barker's* re-interpretation of *Fairchild* as being based on an increase in the risk of harm rather than a material contribution to harm was extremely controversial,[39] and legislative reversal of the proportionate liability aspect of the decision[40] has further undermined its authority. But, even taking these considerations into account, the fact that none of their Lordships in *Rothwell* considered the possibility that *Barker* might offer a springboard from which to recognize the actionability of risk *per se*—even a risk as serious as that of contracting a fatal disease through industrial exposure[41]—speaks volumes for the judiciary's unwillingness to go down this road.

Ultimately, in spite of its superficial similarities to industrial injury cases such as *Fairchild* and *Barker*, *Rothwell* actually has far more in common with the lost chance decision in *Gregg*,[42] where the House of Lords specifically held that risk and anxiety about future injury are not independently recoverable. Both *Gregg* and *Rothwell* are inherently conservative decisions which suggest a desire to maintain, and indeed reinforce, the traditional rules on causation and damage. However, while *Gregg* can be criticized on the ground that a doctor who deprives his patient of a chance of recovery of 50% or less will never have to answer for his negligence,[43] the same cannot be said of *Rothwell*, since an employer who exposes his employee to the risk of a life-threatening asbestosis-related disease *will* be liable for his negligence if the employee actually contracts that disease.

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[38] *Barker*, *supra* note 9 at para. 48.

[39] Lord Rodger, who dissented in *Barker*, described Lord Hoffmann's analysis as "not so much reinterpreting as rewriting the key decisions in *McGhee* … and *Fairchild*." See, *Barker*, *ibid.* at para. 71. For further discussion—and criticism—of the majority's decision in *Barker*, see, *e.g.*, Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law*, 6th ed., (Oxford: Clarendon Press, 2008) [Markesinis and Deakin] at 254-257, and Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in Jason W. Neyers, Erika Chamberlain and Stephen G.A. Pitel, eds., *Emerging Issues in Tort Law*, (Oxford and Portland, Oregon: Hart Publishing, 2007) at 469-476 ["The Gist of Negligence"].

[40] See discussion *supra* note 10.

[41] As Kumaralingam Amirthalingam observes in "The Gist of Negligence," *supra* note 39: "Negligently exposing workers to a potentially fatal disease is an unacceptable risk by any measure, and it would almost certainly be so if tried by a jury." He goes on to refer to the judgment of Smith L.J. in *Rothwell* (C.A.), *supra* note 21 at para. 144, who observed:

> … most people on the Clapham omnibus would consider that workmen who have been put in the position of these claimants have suffered real harm. I do not think that they would regard these consequences of asbestos exposure as trivial or undeserving of compensation.

[42] *Supra* note 5.

[43] For analysis of the difficulties associated with actions for loss of chance, see, *e.g.*, Jane Stapleton, "The Gist of Negligence" (1988) 104 L.Q.R. 389; Helen Reece, "Losses of Chances in the Law" (1996) 59 Mod. L. Rev. 188; Kumaralingam Amirthalingam, "Loss of Chance: Lost Cause or Remote Possibility?" [2003] Cambridge L. J. 253; and Margaret Fordham, "Loss of Chance—A Lost Opportunity?" [2005] Sing. J.L.S. 204.

### B. *Psychiatric Harm*

Mr. Grieves' additional claim for psychiatric harm posed no difficulties in establishing recoverable damage, since he had been diagnosed with clinical depression. The issue here was whether the circumstances which had caused that depression—pre-existing fear of contracting a life-threatening asbestos-related disease, diagnosis with pleural plaques, and knowledge that the level of his exposure to asbestos signalled by the plaques put him at greater risk of contracting such a disease—were sufficient to give rise to a duty of care.

Their Lordships held that they were not. They acknowledged that, as recognized in *Barber v. Somerset County Council*,[44] an employer may owe a duty of care with respect to his employee's psychological well-being, and that the applicable test for establishing duty in such cases is whether the employer ought to have foreseen that the particular employee would suffer psychiatric harm.[45] That being so, a duty might have been established if it had been possible to determine that Mr. Grieves' employers knew of his fears of contracting a life-threatening asbestos-related disease when they negligently exposed him to asbestos.[46] However, since his concerns had really only crystallised towards the end of his employment, and since more than thirty years had passed between the end of that employment and development of the pleural plaques which had triggered the onset of his depression, their Lordships held that it was impossible to make such a determination.[47] In its absence, foreseeability of psychiatric harm had to be assessed by reference to a person of ordinary fortitude, on which basis they found that there was nothing to justify a finding that psychiatric injury was a reasonably foreseeable reaction to pleural plaques.[48]

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[44] [2004] 1 W.L.R. 1089 [*Barber*].

[45] In *Barber*, *ibid.*, Hale L.J. stated (at para. 23) that in the employer/employee context "the threshold question is whether this kind of harm to this particular employee was reasonably foreseeable."

[46] But see Green, *supra* note 34 at 389, who points out that even had knowledge been established, *Barber* would arguably have been distinguishable, since it related to work-related stress rather than work-related risk.

[47] See, *e.g.*, Lord Hoffmann's judgment in *Rothwell*, *supra* note 1 at para. 26: "[An] employer would be unlikely to have any specific knowledge of how a particular employee is likely to react … more than thirty years after he left his employment." This aspect of the decision illustrates how hard it will be for a claimant to establish that he is a 'specifically foreseeable claimant' in a case where the negligent act occurs many years before the psychiatric harm is sustained. The unreliability of personal recollections, the difficulty of obtaining evidence that the defendant knew of the claimant's susceptibilities at the relevant time, and the impossibility (even if knowledge can be established) of being certain how a claimant might actually react several decades later, will almost always prove insuperable obstacles.

[48] See, *e.g.*, Lord Hoffmann, *ibid*., at paras. 26–30 and Lord Hope, *ibid*. at para. 57. Although one of the expert witnesses, Dr. Menon, had concluded that about half of the eighty men with asbestos-related diseases whom he had treated during an eight year period had suffered from actual or suspected mental health problems, the evidence had not distinguished between those who had already been diagnosed with conditions such as asbestosis and mesothelioma and those who were merely at risk of developing such diseases. Dr. Menon had considered that Mr. Grieves' condition, which though triggered by pleural plaques was based on a long-standing fear of contracting an asbestos-related disease, was "relatively unique." This being the only evidence before them, their Lordships (in a conclusion which mirrored the findings in the courts below) therefore held that there was insufficient evidence on which to find that clinical depression was foreseeable to a person of ordinary fortitude.

Their Lordships also considered an alternative argument under *Page v. Smith*.[49] The foundation for this argument was that even if psychiatric injury was not a foreseeable consequence of pleural plaques, Mr. Grieves as a primary victim had only to show that some physical injury (in the form of an asbestos-related disease) was foreseeable. However, on the facts, all five of their Lordships considered the decision to be distinguishable. They concluded that whereas in *Page* the psychiatric illness had resulted directly from a negligent act (a road accident) in which physical damage would have been immediately foreseeable, Mr. Grieves' psychiatric illness had been triggered not by an immediate reaction to the negligent act (exposure to asbestos dust), but by the anxiety which he had suffered thirty years after that exposure when he was told of the presence of pleural plaques in his lungs. This was an intervening causative event which took the case outside the scope of *Page*.[50]

The psychiatric harm aspect of the decision is notable for its adherence to, and unwillingness to extend, existing rules. Of particular significance in this respect is their Lordships' finding that *Page* was distinguishable—a conclusion based on a consciously narrow interpretation of that case. In both cases, the claimant's psychiatric harm in reaction to the trigger-event (in *Page* the accident, in Mr. Grieves' case diagnosis with pleural plaques) was attributable to his pre-existing condition (in *Page* myalgic encephalomyelitis, in Mr. Grieves' case long-standing fear of contracting an asbestos-related disease), and although psychiatric harm could not have been foreseen, damage of some kind through having been in the 'zone of danger' (in *Page* impact damage due to the accident, in Mr. Grieves' case contracting a serious asbestos-related disease due to his working conditions) was foreseeable. The only difference was that whereas in *Page* the negligence and the damage-triggering event were virtually concurrent, in Mr. Grieves' case the long incubation period for asbestos-related diseases separated the two by many decades. In claims for physical damage in mesothelioma and asbestosis cases, the courts accept the presence of an unbroken causal link notwithstanding the fact that the disease may be diagnosed more than forty years after the negligence has occurred. However, in Mr. Grieves' case, their Lordships refused to apply *Page* to recognize the same link with respect to psychiatric harm because, instead of fitting the paradigm of an immediate response

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[49] [1995] 2 W.L.R. 644 (H.L.) [*Page*]. In *Page*, the defendant negligently caused a car accident, in which the claimant could foreseeably have sustained physical injuries, although he did not in fact do so. Instead, the claimant suffered an unforeseeable revival of myalgic encephalomyelitis (ME), a mental condition from which he had previously suffered, but which had been in remission. He became chronically ill, and was unable to work. The House of Lords held that, since the claimant was as a primary victim in the zone of danger, as long as he could establish that *some* damage (whether physical or psychiatric) would have been foreseeable as a result of the defendant's negligence, his action could succeed.

[50] See, *e.g.*, the judgment of Lord Roger in *Rothwell*, *supra* note 1 at para. 95:

> … in *Page* the plaintiff suffered psychiatric harm as a result of being exposed to, but escaping, instant physical harm. In other words, he developed his illness as an immediate response to a past event. Here, by contract, Mr. Grieves developed his illness on learning of a risk that he might possibly develop asbestosis or mesothelioma at some uncertain date in the future.

See, too, the judgment of Lord Hope who, at para. 53, emphasized the need for a link between the stress-inducing event, and who suggested that, in contrast to the situation in *Page*, Mr. Grieves' condition was due not to "a stressful event caused by the breach of duty" but to his "long-standing anticipatory fear of developing an asbestos-related disease." His Lordship concluded at para. 55: "His exposure … was not to stress, but to risk."

to a past event, the claim was based on a delayed response to the risk of a future one.[51]

Although this outcome was undoubtedly very hard on the claimant, their Lordships reached the only decision realistically open to them. *Page* has been the subject of much academic criticism over the years—primarily for its incompatibility with the traditional rules on remoteness.[52] It has also caused considerable judicial disquiet, as was evidenced by the comments of Lord Goff of Chieveley in *Frost v. Chief Constable of South Yorkshire*,[53] and by Lord Steyn's suggestion in the same case that its parameters should be regarded as settled, to be expanded (if at all) only by Parliament.[54] A number of their Lordships in *Rothwell* even implied that they sympathized with the defendants' calls for *Page* to be reconsidered,[55] and although Lord Hoffmann stated that it did "not appear to have caused any practical difficulties," he qualified this by saying that it was not "likely to do so if confined to the kind of situation which the majority in that case had in mind."[56] So, in general terms, their Lordships' refusal to extend the ambit of *Page* was a logical reflection of the discomfort to which it gives rise.

More specifically, had Mr. Grieves' claim succeeded, it would have opened the door to actions by primary victims where the psychiatric harm is to an extent cumulative and not entirely shock-induced—since although Mr. Grieves' depression was triggered by diagnosis with pleural plaques, his apprehension about contracting a serious asbestos-related disease dated from the latter part of his employment thirty years earlier. There is actually much to be said for reconsidering the 'shock' requirement which currently prevails under English law—indeed it has been the subject of profound criticism in many quarters,[57] and has been abandoned altogether by the Australian High Court on the basis that it is "arbitrary and capricious."[58] But,

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[51] See Markesinis and Deakin, *supra* note 39 at 142, where the authors, commenting on the decision in *Rothwell* (C.A.) (*supra* note 21), argue that the rejection of *Page* was based on a narrow interpretation of the requirement that the claimant be in the 'immediate zone of danger.' They add that it is "surprising that the claimant's depression was not regarded as closely analogous to the development of the plaintiff's ME in *Page*."

[52] See, *e.g.*, Francis Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 L.Q.R. 22; Peter Handford, "A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords" (1996) 4 Tort L. Rev. 5; and Nicholas Mullany, "English Psychiatric Injury Law: Chronically Depressing" (1999) 115 L.Q.R. 30.

[53] [1999] 2 A.C. 455 at 473–474 (also reported *sub nom. White v. Chief Constable*).

[54] *Ibid*. at 500. Lord Steyn's suggestion was referred to by a number of their Lordships in *Rothwell*, *supra* note 1, including Lord Hope at para. 54.

[55] See, *e.g.*, the judgments of Lord Hope at para. 52 and Lord Mance at para. 104 in *Rothwell*, *supra* note 1.

[56] *Ibid*. at para. 32.

[57] For criticisms of English position on shock-induced harm, see Harvey Teff, "The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage" (1996) 4 Tort L. Rev. 44, and Markesinis and Deakin, *supra* note 39 at 146. See also the Law Commission Consultation Paper, *Liability for Psychiatric Illness* (Law Com. No. 137) (London: HMSO, 1995), and its final report, *Liability for Psychiatric Illness* (Law Com. No. 249) (London: TSO, 1998) [Law Commission Report] which proposed across-the-board removal of the 'shock' requirement. Note that, as currently interpreted, English law does not require the shock to be induced by a single catastrophic event, although the time-frame does have to be limited. Thus, in *North Glamorgan NHS Trust v. Walters* [2002] EWCA Civ. 1792 [*Walters*], damages were awarded for a pathological grief reaction caused by a series of medical errors during a thirty-six hour period which resulted in the death of the claimant's son.

[58] See *Tame v. New South Wales*; *Annetts v. Australian Stations Pty. Ltd.* [2002] HCA 35, (2002) 191 A.L.R. 449 at 190.

such a re-consideration should be carried out in the context of a full and careful re-assessment of the law in this area, rather than through a selective and piece-meal process. Apart from anything else, if their Lordships had relaxed the shock requirement for primary victims under *Page*, this would have widened still further the gulf in English law between primary and secondary victims in psychiatric harm cases. The combined effect of *Page* and *Alcock v. Chief Constable of South Yorkshire*[59] already greatly disadvantages secondary victims, by requiring not only that their psychiatric harm be foreseeable when that of primary victims need not be, but also that they satisfy strict relational, temporal and perceptional requirements, which are not required of primary victims who automatically fall within the 'zone of danger.' If to this had been added the ability of primary victims to sue under *Page* for gradual and ongoing mental distress rather than for damage caused by 'shock,' the comparison would have become even more odious.[60]

## IV. Conclusion

The decision in *Rothwell* has left a class of claimants without a remedy against employers who negligently expose them to the risk of contracting a life-threatening disease.[61] But the law cannot always respond to what is sympathetic, and the expression 'hard cases make bad law' is a truism precisely because it is true. The relaxation of well-founded rules in order to do justice in a particular case can lead to undesirable and unforeseen consequences, and the decision to turn back to a traditional approach to damage in *Rothwell* was right, if not kind. In rejecting a practice of twenty years, their Lordships brought English law back into line with that of jurisdictions such as Australia and the United States.[62] More importantly, they confirmed a generally narrow approach to damage—one where not every 'injury' will give rise to damages.

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[59] [1992] 1 A.C. 310 [*Alcock*]. For further discussion of this point, see Green, *supra* note 34 at 389.

[60] See the Law Commission Report, *supra* note 57, which recognized this divide and made several—so far unlegislated—proposals for reform, including relaxation of the relational requirement and removal of the temporal and perceptional requirements for secondary victims.

[61] The only crumbs of comfort from an employee's perspective are their Lordships' recognition that their decision in *Rothwell* struck a "discordant note" (*supra* note 1 at para. 74, per Lord Scott), and their resulting suggestion that employees who develop pleural plaques might be able to pursue contractual remedies against their employers (see Lord Scott at para. 74, Lord Hope at para. 59, and Lord Mance at para. 105), as well as their rejection of largely unsubstantiated and heavily criticized assertions by the insurance industry that the costs of asbestos litigation in general outweigh its benefits. These arguments, some of which had been accepted by the majority in the Court of Appeal, were dismissed by their Lordships as speculative and unattractive. See, *e.g.*, the judgments in *Rothwell*, *supra* note 1, of Lord Hoffman at para. 17 and Lord Hope at para. 50.

[62] See, *e.g.*, *Nixon v. Philip Morris* [1999] FCA 1107 and *Norfolk & Railway Company v. Freeman Ayers et al.* (2003) 538 US 135, where the courts refused to treat asymptomatic pleural thickening as recoverable harm—although in both Northern Ireland and Scotland, presumably mirroring the previous English position, the legitimacy of claims for pleural plaques has been accepted (see, *e.g.*, *Bittles v. Harland & Woolf* [2000] NIQB 13 and *Gibson v. Andrew Wormland* [1998] SLT 562). In Singapore, the courts have traditionally, although not, at least in recent years, unquestioningly—as is shown by their attitude to pure economic loss—followed the approach taken by the English courts in most matters, including the definition of damage and damages. There have been no cases on pleural plaques, but if such cases were now to come before the courts, it seems likely that they would take the same approach as the House of Lords.

Where claims for psychiatric harm under English law are concerned, a question mark must now hang over *Page*—which was, significantly, recently rejected by the Singapore Court of Appeal in *Ngiam Kong Seng and Anor. v. Lim Chiew Hock*.[63] Their Lordships' somewhat half-hearted acceptance of *Page* in *Rothwell* certainly suggests that it will not be applied outside its immediate facts, and there is much to be said for English law now following the Singapore example and putting an end to *Page*'s rather unhappy existence. Indeed, given the lack of clarity in primary victim situations and the overly onerous hurdles faced by secondary victims— as well as the desirability of resolving the 'shock' issue for both categories of claimant—what English law in this area really needs now is an opportunity for wholesale re-evaluation.[64]

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[63] [2008] SGCA 23 [*Ngiam*]. Having referred to the many criticisms of *Page*, and to its lukewarm treatment in *Rothwell*, the Singapore Court of Appeal in *Ngiam* (in a judgment delivered by Andrew Phang J. A.) concluded at para. 95:

> Although English decisions on the common law (in particular, those emanating from the House of Lords) are accorded great respect by our courts, they ought not to be followed blindly. Given the various difficulties pertaining to both justification as well as justice and fairness with regard to *Page*… this is one occasion when we would respectfully hold that the law as laid down by the majority in *Page* ought not to be followed.

While the discussion of *Page* was, strictly speaking, obiter (since the case involved a claim by a secondary victim), it is extremely unlikely that if a primary victim case involving a *Page*-type scenario were to be brought before the lower courts they would depart from the carefully considered conclusion arrived at in *Ngiam*.

[64] See *supra* notes 57 and 60. While the Singapore Court of Appeal in *Ngiam*, *supra* note 63, summarized the law relating to psychiatric harm, it steered clear of a full-scale re-evaluation of the area. In delivering the judgment of the court, Phang J. A. confirmed the application in secondary victim cases of the relational, spatial/temporal and perceptional proximities (originally formulated by Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410) within the framework of the two-stage test of proximity and policy laid down in *Spandeck Engineering (S) Pte Ltd. v. Defence Science & Technology Agency* [2007] 4 S.L.R. 100, and also held that both primary and secondary victims must establish psychiatric harm to be a foreseeable consequence of a defendant's negligence. However, he went on to observe (at para. 120) that the question of "whether or not reform of this area of the tort of negligence [including the common law requirement prescribing the need for sudden shock] is to be effected is one that is best left to the Legislature." On the facts of *Ngiam*—where the claimant suffered shock on finding that the person whom she had considered to be a good Samaritan had actually been involved in the accident in which her husband had been badly injured—the Court held that the action must fail through lack of legal proximity. Shortly after the decision in *Ngiam*, the Court of Appeal reached its decision in *Man Mohan Singh s/o Jothirambal Singh and Anor. v. Zurich Insurance (Singapore) Pte Ltd and Anor.* [2008] SGCA 24. Among the issues raised in that appeal was the question of whether the claimants, who had arrived at hospital following a road accident involving their sons to see one son dead and the other dying, satisfied the requirement of spatial and temporal proximity. Applying the approach to psychiatric harm laid down in *Ngiam*, the Court held that they did not, since they had neither been at the scene of the accident, nor had they witnessed its immediate aftermath.